Supreme Court, U.S.
FILED

No. 99-991584 MAR 29 2000

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1999

THE PEOPLE OF THE STATE OF CALIFORNIA, *Petitioner*,

v.

BRENT A. JOHNSON, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, FOURTH APPELLATE DISTRICT, DIVISION ONE

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Should this Court address the questions left open in both *Wilson v. Arkansas*, 514 U.S. 927, 937, n.4 (1995), and *United States v. Rameriz*, 523 U.S. 65, 73, n.3 (1998), and resolve conflicting decisions among the United States Courts of Appeals and among the state supreme courts as to whether the Fourth Amendment mandates the exclusion of evidence seized pursuant to a valid search warrant if, when executing the warrant, officers violate knock and announce requirement?

2. Does a search warrant fully supported by probable cause constitute an "independent source" for the discovery of evidence seized during execution of the warrant, notwithstanding a technical knock and announce violation?

3. Does the Fourth Amendment compel exclusion of evidence obtained pursuant to a valid search warrant if the evidence inevitably would have been discovered had the police officers complied with knock and announce requirements when executing the warrant?

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APPENDIX 2

Order denying Respondent's Petition for Review, Filed February 2, 2000, in *People v. Brent A. Johnson* (D030489/S087697) A-8

IN THE SUPREME COURT OF THE UNITED STATES

No. 99-_____

THE PEOPLE OF THE STATE OF CALIFORNIA, *Petitioner*,

v.

BRENT A. JOHNSON, *Respondent*.

PETITION FOR WRIT OF CERTIORARI

Petitioner, the People of the State of California, respectfully petitions for a writ of certiorari, pursuant to Sup. Ct. Rules 10(b) and (c), to review the judgment of the California Court of Appeal, Fourth Appellate District, Division One in this case.

OPINIONS BELOW

The unpublished opinion of the California Fourth District Court of Appeal, Division One (case number D030489) issued on November 19, 1999, is reproduced in the Appendix. App. at A-1 - A-7.

The February 2, 2000, order of the California Supreme Court denying review of the November 19, 1999, opinion of the California Court of Appeal, Fourth Appellate District, Division One is reproduced in the Appendix. App. at A-8.

STATEMENT OF JURISDICTION

The judgment of the California Court of Appeal, Fourth Appellate District, Division One was issued on November 19, 1999. App. at A-1. The California Supreme Court denied Petitioner's petition for review on February 2, 2000. App. at A-8. The jurisdiction of this Court is invoked pursuant to Sup. Ct. Rule 10 and Title 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. Amend. IV.

STATEMENT OF THE CASE

In February 1997, Respondent, Brent A. Johnson, was charged with possession for sale of methamphetamine (Cal. Health & Safety Code § 11378 (West 1997)); possession of methamphetamine (Cal. Health & Safety Code § 11377 (West 1997)); possession of marijuana for sale (Cal. Health & Safety Code § 11359 (West 1997)); and possession of a firearm by a possessor of a controlled substance. (Cal. Health & Safety Code

§ 11370.1(a) (West 1997)). Three of the counts further alleged appellant was personally armed with a firearm during the commission of those offenses (Cal. Penal Code § 12022(a)(1) and (c) (West 1997)). CT 4-5. Respondent filed a motion to suppress evidence in which he contended evidence seized during the execution of a search warrant at his residence should be suppressed because the officers failed to comply with the requirements of the California "knock-notice" statute (Cal. Penal Code § 1531 (West 1997)), in violation of the Fourth Amendment.[1] CT 6, 83.

At 6:10 a.m., on January 16, 1997, the tactical operations unit of the Escondido Police Department served a narcotics search warrant, endorsed for night service, at an apartment in Escondido, California. RT 8. Prior to executing the warrant, officers knew from an informant that someone inside the house was known to keep a gun by his side or close to him. RT 10. An officer was specifically informed that appellant was "possibly armed," that there was a large amount of drugs in the house and appellant was "known to have a weapon by his side." RT 20. Based on this information, the tactical operations unit treated the execution of the warrant as "a dangerous situation with a potential for violence." RT 11.

When officers arrived at the apartment, the officers approached the front door of the apartment, and

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1. Cal. Penal Code § 1531 (West 1997), provides:

OFFICER MAY BREAK OPEN DOOR, ETC., TO EXECUTE WARRANT

The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute the warrant, if, after notice of his authority and purpose, he is refused admittance.

noticed a sticker announcing, "insured by Glock."[2/] The investigating officer considered the sticker to indicate that the occupants of the house possessed some type of weapon or firearm. RT 12, 15-16.

An officer then shouted "Escondido Police Department with a search warrant. Demanding entry." RT 8-9, 15-16. The announcement was loud enough to be heard by members of the tactical operations unit on the back side of the building. RT 17. After making the announcement, another officer immediately began hitting the door with a battering ram, but after one attempt the officer discovered the door was heavily barricaded, thus increasing his belief there was a potential for violence. RT 9, 13, 15-17.

After seven to eight more attempts, the door finally opened and the officers were able to enter. RT 15-16. Upon entry, the officers discovered a large piece of furniture blocking the door, so they pushed it back and quickly moved to secure the rooms. RT 17-19. It took between 35-45 seconds between the time the officers knocked and announced their presence and when officers entered the house.[3/] RT 16.

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2. Glock is a type of semi-automatic handgun. *See, e.g., United States v. Richardson*, 161 F.3d 728, 730-733 (D.D.C. 1998); *Wasylow v. Glock, Inc.*, 975 F. Supp. 370, *passim* (D.Mass. 1996).

3. In the first bedroom officers discovered an individual named, Philip Papp, a 9-millimeter derringer firearm, a knife and a bag of marijuana. In the master bedroom, where appellant and a woman were found, officers recovered a 12-gauge shotgun within reach of appellant, a plastic gun case containing 8.43 grams of amphetamine, a pound of marijuana, $290 in cash, a pager, ammunition and a ledger with dollar amounts written in it. A Glock, 9-millimeter semi-automatic handgun was recovered from a safe in the master

The trial court denied Respondent's motion to suppress finding the officers had reasonable suspicion to believe their safety was imperiled, and thus exigent circumstances excused compliance with the provisions of Cal. Penal Code section 1531 (West 1997). RT 28-29, 83. Thereafter, Respondent entered a plea of guilty to possessing methamphetamine for sale and admitted the firearm allegation. RT 53-54, 85.

On November 19, 1999, in an unpublished opinion, Division One of the California Fourth District Court of Appeal reversed the judgment of the trial court, finding there were no exigent circumstances excusing the officers' compliance with the knock-notice requirements of Cal. Penal Code § 1531 (West 1997), citing *Wilson v. Arkansas*, 514 U.S. 927, 934 (1995). The court also found the inevitable discovery exception to the exclusionary rule did not apply to knock-notice violations and exclusion of the evidence obtained during execution of a search warrant was the appropriate remedy.[4] In so doing, the

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bedroom. CT 56-57.

After the search, appellant admitted to the officers that the drugs, guns and everything else that the officers found in the master bedroom belonged to him, and that he sold one to two pounds of marijuana a week. CT 57.

4. Under California law, the exclusion of evidence is permitted only when mandated by the Fourth Amendment and federal law interpreting the Fourth Amendment. Cal. Const. art. I, § 28(d); *In re Lance W.*, 37 Cal. 3d 873, 694 P. 2d 744, 210 Cal. Rptr. 631 (Cal. 1985). California law permits issues such as the "inevitably discovery" and "independent source" doctrines to be raised for the first time on appeal when a defendant is challenging a trial court's denial of a motion to suppress evidence. *People v. Clark*, 5 Cal. 4th 950, 993, n.19, 857 P.2d 1097, 1125, n.19, 22 Cal. Rptr. 2d 689, 715, n.19 (Cal. 1993), *quoting Green*

Court of Appeal found the decision in *People v. Llamas*, 229 Cal. App. 3d 560, 568-572, 282 Cal. Rptr. 296, 300-302 (Cal. Ct. App. 1991), which relied on cases of this Court setting forth the Fourth Amendment principles of "independent source" and "inevitable discovery" did not apply. App. at 1.

On February 2, 2000, the California Supreme Court denied Petitioner's petition for review. App. at A-8.

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v. Superior Court, 40 Cal. 3d 126, 138, 707 P.2d 248, 255-256, 219 Cal. Rptr. 186, 193-194 (Cal. 1985). Thus, the decision of the Court of Appeal properly raises a federal question pursuant to Rule 14(g)(i) of the Sup. Ct. Rules.

REASONS FOR GRANTING THE WRIT

I.

THE COURT SHOULD ADDRESS THE QUESTION IT LEFT OPEN IN BOTH *WILSON V. ARKANSAS*, 514 U.S. 927, 937, N.4 (1995), AND *UNITED STATES V. RAMIREZ*, 523 U.S. 65, 72, N.3 (1998), AND CONFLICTING DECISIONS AMONG THE UNITED STATES COURTS OF APPEALS AND AMONG THE STATE SUPREME COURTS AS TO WHETHER THE FOURTH AMENDMENT MANDATES EXCLUSION OF EVIDENCE SEIZED PURSUANT TO A VALID SEARCH WARRANT IF, WHEN EXECUTING THE WARRANT, OFFICERS VIOLATE KNOCK AND ANNOUNCE REQUIREMENTS

In three recent decisions by this Court, the Court provided much needed guidance to law enforcement officials and lower courts on issues pertaining to knock and announce requirements when police officers execute search warrant. In those decisions, however, the Court left open the question of whether the Fourth Amendment requires exclusion of evidence seized pursuant to a search warrant supported by probable cause if officers violate knock and announce requirements when executing the warrant. As a result, confusion and conflict exists and continues to grow in lower courts across the Nation on this issue. This case presents an opportunity for this Court to resolve this question and to provide much needed guidance to law enforcement officers and courts on this crucial area of Fourth Amendment jurisprudence.

In *Wilson v. Arkansas*, 514 U.S. at 933, this Court held the principles of "knock and announce" when law enforcement officials execute a search warrant at a

dwelling forms part of the reasonableness inquiry of the Fourth Amendment to the United States Constitution. Although in some circumstances a search or seizure of a dwelling might be constitutionally defective if police officers enter without prior announcement, law enforcement interests may also establish the reasonableness of an unannounced entry. This Court left it to the lower courts to determine the circumstances under which such an unannounced entry might be reasonable. *Id.* at 936.

In *Wilson*, the State of Arkansas and amicus on behalf of 31 states, including California, requested the Court determine whether exclusion of evidence obtained during execution of a search warrant must be suppressed pursuant to the Fourth Amendment when officers violate knock and announce requirements during the execution of the warrant. Although the Court questioned counsel at oral argument regarding the applicability of the "inevitable discovery" exception to knock and announce violations (*Wilson v. Arkansas*, 1995 U.S TRANS LEXIS 98 (1995)), the Court declined to resolve the issue because the question was not within the scope of the narrow question on which the Court granted certiorari. *Wilson*, 514 U.S. at 937, n.4. *See United States v. Shugart*, 889 F. Supp. 963, 976, n.9 (E.D.Tex. 1995), *aff'd* 117 F.3d 838 (5th Cir. 1997) (noting "scant case law" discussing applicability of the inevitable discovery doctrine to violations of knock and announce requirements and commenting that issue was pending before the Court in *Wilson v. Arkansas*).

Two years later, in *Richards v. Wisconsin*, 520 U.S. 385 (1997), the Court further delineated the circumstances which may excuse an officer's unannounced entry into a dwelling to execute a search warrant. Although *Richards* affirmed the denial of the petitioner's motion to suppress, the Court disagreed with the holding of the Wisconsin Supreme Court that officers are never required to knock and announce their presence when executing a search warrant in felony drug investigations.

Specifically, this Court held "[t]he Fourth Amendment does not permit a blanket exception to the knock-and-announce requirement for felony drug investigations." *Richards*, 520 U.S. at 388. The Court explained:

> If a per se exception were allowed for each category of criminal investigation that included a considerable--albeit hypothetical--risk of danger to officers or destruction of evidence, the knock-and-announce element of the Fourth Amendment's reasonableness requirement would be meaningless.

Richards, 520 U.S. at 395.

Subsequently, in *United States v. Rameriz*, 523 U.S. at 70-71, this Court held the lawfulness of a no-knock entry does not depend on whether police damage property during the course of their entry. In finding the officers did not violate the Fourth Amendment in entering a residence to effectuate the arrest of an escapee, the Court noted it was not necessary to decide whether "there was sufficient causal relationship between the breaking of the window and the discovery of the gun to warrant suppression of the evidence," citing *Nix v. Williams*, 467 U.S. at 431, and *Wong Sun v. United States*, 371 U.S. 471 (1963). *Rameriz*, 523 U.S. at 73, n.3.

A. This Court Should Grant Certiorari To Resolve Conflicting Decisions And Confusion Among Lower Federal And State Supreme Courts As To Whether The Fourth Amendment Mandates Exclusion Of Evidence Seized Pursuant To A Valid Search Warrant If, When Executing The Warrant, Officers Violate Knock And Announce Requirements

The question of whether the Fourth Amendment mandates the suppression of evidence seized pursuant to a search warrant when an officer violates knock and announce requirements during execution of the warrant remains unresolved, and has vexed the lower federal and state supreme courts as evidenced in their attempts to resolve this issue. The law in Michigan and Arkansas for example is diametrically opposed on this important constitutional issue.

In *People v. Stevens*, 460 Mich. 626, 597 N.W.2d 53 (Mich. 1999), *cert. denied* ___ U.S. ___, 145 L. Ed. 2d 1088 (2000), the Michigan Supreme Court recently held the exclusionary rule *does not* apply to a violation of knock and announce principles as the seizure of the evidence is not causally connected to the violation. Relying primarily on this Court's decision in *Nix v. Williams*, 467 U.S. at 431, the court held the evidence inevitably would have been discovered, as it was not the means of entry that led to the discovery of the evidence. Rather, it was the authority of the valid search warrant that enabled police to search and seize the evidence. *Stevens*, 460 Mich. at 638-643, 597 N.W.2d at 60-63; *see also Commonwealth v. Lopez*, 31 Mass. App. Ct. 547, 549-550, 581 N.E.2d 485, 486-487 (Mass. App. Ct. 1991) (even if no-knock provision improperly included in warrant, search demonstrated exclusion would not advance deterrent effect).

Meanwhile, finding the manner in which officers enter a home to execute a search warrant is a factor to consider in assessing the reasonableness of a search and

seizure, in *Mazepink v. State*, 336 Ark. 171, 987 S.W.2d 648 (Ark.), *cert. denied* ___ U.S. ___, 120 S. Ct. 321, 145 L. Ed. 2d 250 (1999), the Arkansas Supreme Court rejected use of the inevitable discovery doctrine and held "the only practical remedy" for violations of knock and announce requirements is suppression of the evidence obtained as a result of the search. *Id.* at 187-189, 191, 987 S.W.2d at 656-658; *see also Commonwealth v. Means*, 531 Pa. 504, 506-509, 614 A.2d 220, 222-223 (Pa. 1992) (Pennsylvania Supreme Court felt "constrained" to find that pursuant to state knock and announce statute and "the Fourth Amendment's prohibition against unreasonable searches and seizures," evidence seized pursuant to a valid search warrant must be suppressed because officers did not comply with the knock and announce statute); *Commonwealth v. Rudisill*, 424 Pa. Super. 313, 622 A.2d 397, 400, n.7 (Pa. Super. 1993) (Rejecting the Commonwealth's argument that the inevitable discovery doctrine applied even though officers would have found the drugs pursuant to a lawful execution of the warrant, because there were no alternative plans to enter the house to be searched in another manner. Thus, the "taint" from the knock and announce violation was not purged).

Such differences in the interpretation of this Court's Fourth Amendment jurisprudence and the reach of the exclusionary rule is also evident in the conflicting opinions of the United States Courts of Appeals both before and after the Court's decisions in *Wilson* and *Rameriz*. Recently, in *United States v. Dice*, 200 F.3d 978, 985-987 (6th Cir. 2000), the Sixth Circuit rejected the government's suggestion that either the independent source rule or the inevitable discovery exception to the exclusionary rule applies to violations of knock and announce requirements. Instead, the Court held a violation of the knock and announce provisions in 18

U.S.C. § 3109[5] during the execution of a search warrant should result in the suppression of evidence seized in the search following the violation.

Similarly, in *United States v. Marts*, 986 F.2d 1216, 1217, 1219 (8th Cir. 1993), the Eighth Circuit rejected the government's contention that the "good faith" exception to the exclusionary rule as set forth in *United States v. Leon*, 468 U.S. 897 (1984), should apply to the officers' violation of the knock and announce provisions in 18 U.S.C. § 3109, even though officers knocked and announced their presence and purpose, but waited less than five seconds before entering an unlocked door to execute a search warrant. The *Marts* court also declined to employ the independent source doctrine, stating the government did not raise the issue in the lower court. *Marts*, 986 F.2d at 1219-1220. *But see Marts*, 986 F.2d at 1220-1222 (Fagg J. dissenting) ("Under the independent source doctrine, a court cannot suppress evidence gathered in a warrant search following an illegal entry if the warrant was issued on information from sources unrelated to the entry and the entry did not contribute to the discovery of the evidence seized under the warrant."); *cf. Arroyo v. United States*, 195 F.3d 54, 56 (1st Cir. 1999) (court finds it unnecessary to reach the government's inevitable discovery argument); *United States v. Shugart*, 889 F. Supp. at 975 (same).

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5. 18 U.S.C. § 3109 provided:

> The officer may beak open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute a search warrant, if, after notice of his authority and purpose, he is refused admittance or when necessary to liberate himself or a person aiding him in the execution of the warrant.

However, in *Barrientes v. United States*, 235 F.2d 116, 117 (5th Cir. 1956), the Fifth Circuit held a violation of 18 U.S.C. § 3109, will not invalidate a search and seizure made under it. In *United States v. Freeman*, 144 F. Supp. 669, 670-671 (D.D.C. 1956), the district court found that while 18 U.S.C. § 3109 directed the mode of executing a search warrant, a violation of the statute did not necessarily rise to the "dignity of a violation of the Fourth Amendment." In particular, the court noted:

> It is well settled, of course, that evidence illegally obtained, if the illegality does not consist of a violation of a constitutional provision, is not rendered inadmissible by the mode by which it was obtained. . . . [S]ection 2234 of Title 18 imposes a criminal penalty on anyone who willfully exceeds his authority in executing a search warrant. In other words, an officer who willfully executes a search warrant in an illegal manner, may, perhaps, subject himself to criminal liability, but since the statute limits itself to imposing a criminal liability it cannot be implied that an additional penalty is imposed upon the public in making the evidence so obtained inadmissible.

United States v. Freeman, 144 F. Supp. at 670-671.

In *United States v. Hidalgo*, 747 F. Supp. 818, 831-836 (D.Mass. 1990), the court suppressed statements made by the defendant after officers violated the knock and announce provisions of 18 U.S.C. § 3109, but found the inevitable discovery and independent source doctrines permitted the admission of physical evidence seized after the illegal entry. In *United States v. Jones*, 149 F. 3d 715, 716-717 (7th Cir. 1998), the Seventh Circuit, while not required directly to address the issue, commented on this Court's decision in *Wilson*, not to resolve the issue:

> It is hard to understand how the discovery of evidence inside a house could be anything but 'inevitable' once the police arrive with a warrant; an occupant would hardly be allowed to contend that, had the officers announced their presence and waited longer to enter he would have had time to destroy the evidence. See *Segura*, 468 U.S. at 816. But because the entry at the front door played no role in the chain of events leading to Jones's seizure on the lawn, we, too, can leave the inevitable-discovery question for another day.

The conflicting decisions by state supreme courts and federal courts as to whether the exclusionary rule should extend to suppress evidence seized when there is a violation of knock and announce requirements is evident. These conflicts not only hinder law enforcement officers in understanding the practicalities and breath of the exclusionary rule's application to violations of knock and announce requirements, but for states like California, in which exclusion of evidence in a criminal proceeding is required only when mandated by the United States Constitution and federal law interpreting the Constitution (*Ker v. California*, 374 U.S. at 30-31; Cal. Const. art. I, § 28(d); *In re Lance W.*, 37 Cal. 3d at 873, 694 P.2d at 744, 210 Cal. Rptr. at 631), the conflicting decisions provide no positive guidance as to whether the Fourth Amendment requires the suppression of evidence obtained pursuant to a search warrant when officers fail to comply with knock and announce requirements in executing the warrant.[6]

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6. In addition to 18 U.S.C. § 3109, almost every state has statutory provisions which regulate the manner in which law enforcement officers must provide notice to occupants prior to the execution of a search warrant.

As this Court observed in *Ker v. California*, 374 U.S. at 31, *quoting Mapp v. Ohio*, 367 U.S. 643, 658 (1961):

> '[A] healthy federalism depends upon the avoidance of needless conflict between federal courts' by itself urging that 'federal-state cooperation' in the solution of crime under constitutional standards will be promoted, if only by recognition of their now mutual obligation to respect the same fundamental criteria in their approaches.

For theses reasons, this Court should grant certiorari in this case to resolve the "needless conflict" which has arisen on this issue.

B. <u>The Violation Of Knock And Announce Requirements When Executing A Valid Search Warrant Supported By Probable Cause, Does Not Taint Evidence Seized Pursuant To The Warrant</u>

From its inception, the exclusionary rule was not designed to remedy all violations of police misconduct in the execution of a search warrant.

> As cases considering the use of unlawfully obtained evidence in criminal trials themselves make clear, it does not follow from the emphasis on the exclusionary rule's deterrent value that 'anything which deters illegal searches is thereby commanded by the Fourth Amendment.' *United States v. Leon*, 468 U.S. 910 (citation omitted).

In *New York v. Harris*, 459 U.S. 14, 19-21 (1990), the Court found that even though the arrest of the defendant in his home without an arrest warrant and

without his consent to enter the home violated the dictates of *Payton v. New York*, 445 U.S. 573, 590 (1980), the exclusionary rule did not extend to the defendant's subsequent statements at the police station. In reasoning apt to knock and announce violations, the Court held the indirect fruits of an illegal search or arrest should be suppressed only when they bear a sufficiently close relationship to the underlying illegality. This attenuation analysis, however, is appropriate only where, as a threshold matter, a court determines the challenged evidence is the product of illegal governmental activity. If probable cause exists to seek and issue a search warrant, the illegality cannot be presumed. It is the absence of probable cause which is the illegality that directly contributes to illegally obtained evidence. *New York v. Harris*, 495 U.S. at 19; *cf. United States v. Crews*, 445 U.S. 463, 475 (1980) (illegal arrest of defendant at which time his photo was taken and later shown to victims did not taint victims' subsequent identification of defendant; the evidence was not obtained by "exploitation" of defendant's Fourth Amendment rights).

Case law on the ramifications of the failure to include a "night search" authorization in a search warrant is also instructive. Several Circuit Courts have held when officers fail to comply with the requirements for obtaining night search authority under Fed. R. Crim. P. 41, the particular procedures employed before such a search may be conducted are not part of the Fourth Amendment. In *United States v. Schoenheit*, 856 F.2d 74, 77 (8th Cir. 1988), the court held Rule 41 and the Fourth Amendment are not coextensive. While the time of the search is a relevant consideration in determining whether a search is reasonable under the Constitution, it cannot be concluded a search is per se unconstitutional simply because it was conducted at night. Therefore, suppression should not automatically result from the violation of such rules. *Schoenheit*, 856 F.2d at 77; *United States v. Searp*, 586 F.2d 1117, 1124 (6th Cir. 1978); *United States v. Burgard*, 551

F.2d 190, 193 (8th Cir. 1977), *cert. denied*, 440 U.S. 910 (1979); *United States v. Burke*, 517 F.2d 377, 386-387 (2d Cir. 1975); *United States v. Ravich*, 421 F.2d 1196, 1201 (2d Cir. 1970), *cert. denied*, 400 U.S. 834 (1970); *see also United States v. Shelton*, 742 F. Supp. 1491, 1502-1503 (D. Wyo. 1990); *United States v. Pryor*, 652 F. Supp. 1353, 1364-1366 (D. Maine 1987). Instead, the courts have found the drastic remedy of exclusion is not required unless the search would not have otherwise occurred, or as the court in *United States v. Burke*, 517 F.2d at 386-387, held there was evidence of an intentional and deliberate disregard of Fed. R. Crim P. 41.

> This does not mean, of course, that violation of the required procedures is unimportant; indeed the procedures are the only way to prevent infringements of individual rights. Rather, we hold that requiring suppression in all cases would be a remedy out of all proportion to the benefits gained to the end of obtaining justice while preserving individual liberties unimpaired.

Searp, 586 F.2d at 1123.

Similarly, it is not the failure of police officers to comply with knock and announce procedures which results in the seizure of evidence pursuant to a search warrant, but the warrant itself which provides the basis for the search.

> The exclusionary rule enjoins the 'Government from benefitting from evidence it has unlawfully obtained; it does not reach backward to taint information that was in official hands prior to any illegality.' *Crews*, 445 U.S. at 475. The Fourth Amendment does not require the exclusion of evidence seized pursuant to a valid warrant even if entry to execute the warrant was

not preceded by adherence to knock and announce requirement.

The increasing number of conflicting decisions of courts across the Nation cry out for settlement of this issue by the Court. For these reasons, and those discussed below, certiorari should be granted to resolve this issue of wide constitutional significance.

II.

A SEARCH WARRANT SUPPORTED BY PROBABLE CAUSE CONSTITUTES AN "INDEPENDENT SOURCE" FOR THE DISCOVERY OF EVIDENCE SEIZED DURING EXECUTION OF THE WARRANT NOTWITHSTANDING A FAILURE TO COMPLY WITH KNOCK AND ANNOUNCE PROVISIONS

This Court also should grant certiorari to determine whether a search warrant support by probable cause constitutes an "independent source" for the discovery of evidence seized during execution of the warrant, notwithstanding a knock and announce violation. The reasoning in *Murray v. United States*, 487 U.S. 533 (1988), and *Segura v. United States*, 468 U.S. 796 (1984), compel the conclusion that if police officers violate knock and announce provisions in executing a search warrant the evidence seized pursuant to the warrant should not be suppressed as the "independent source" of the evidence is the search warrant, not the entry into the dwelling to execute the warrant.

As Justice Frankfurter stated in *Wolf v. Colorado*, 338 U.S. 25, 28-29 (1949):

> In *Weeks v. United States, supra,* this Court held that in a federal prosecution the Fourth Amendment barred the use of evidence secured through an illegal search and seizure. This ruling was made for the first time in 1914. It was not derived from the explicit requirements of the Fourth Amendment; it was not based on legislation expressing Congressional policy in the enforcement of the Constitution. The decision was a matter of judicial implication. Since then it has been frequently applied and we stoutly

> adhere to it. But the immediate question is whether the basic right to protection against arbitrary intrusion by the police demands the exclusion of logically relevant evidence obtained by an unreasonable search and seizure. . . As a matter of inherent reason, one would suppose this to be an issue as to which men with complete devotion to the protection of the right of privacy might give different answers. When we find that in fact most of the English-speaking world does not regard as vital to such protection the exclusion of evidence thus obtained, we must hesitate to treat this remedy as an essential ingredient of the right.

This Court has invoked the exclusionary rule to suppress both the direct and indirect products of a Fourth Amendment violation. *Murray v. United States*, 487 U.S. at 536-537; *Wong Sun v. United States*, 371 U.S. at 484-485. In either case, suppression is appropriate only if, at a minimum, "the challenged evidence is in some sense the product of illegal governmental activity." *United States v. Crews*, 445 U.S. at 471. The test for determining whether evidence is the product or "fruit" of a prior illegality is whether "the illegality is at least the 'but for' cause of the discovery of the evidence." *Segura v. United States*, 468 U.S. at 815.

When a search warrant supported by probable cause is issued by a neutral and detached magistrate, it is the search warrant, not the mode of entry to execute the warrant, which is the "but for" cause of the discovery of evidence seized pursuant to the warrant. The same search would have occurred even had the officers fully complied with knock and announce principles in their mode of entry. Thus, the warrant, which was sought and issued based on information developed prior to any illegal entry, provided the "independent source" for the evidence seized during its execution. *Murray*, 487 U.S. at 541; *Segura*, 468

U.S. at 799. The relationship between the illegal entry and the subsequent search resides solely in the fact that the former preceded the latter. As *Murray* and *Segura* held, this is insufficient to establish legal causation.

In *Segura*, police developed probable cause to believe evidence would be found at the defendant's residence and decided to obtain a search warrant. Prior to obtaining the warrant, however, the officers arrested the defendant, made an illegal warrantless entry into his residence, and conducted an unjustified protective sweep of the premises. Later, when the warrant was issued, the officers searched the residence and seized certain items of evidence. *Segura*, 468 U.S. at 800-801. The defendant claimed the evidence seized after the illegal entry and sweep of the residence should have been excluded as the fruit of these illegalities. In rejecting this causation theory, the Court stated:

> Whether the initial entry was illegal or not is irrelevant to the admissibility of the challenged evidence because there was an independent source for the warrant under which that evidence was seized. . . .
>
> None of the information on which the warrant was secured was derived from or related in any way to the initial entry into petitioner's apartment; the information came from sources wholly unconnected with the entry and was known to the agents well before the initial entry. No information obtained during the initial entry or occupation of the apartment was needed or used by the agents to secure the warrant. It is therefore beyond dispute that the information possessed by the agents before they entered the apartment constituted an independent source for the discovery and seizure of the evidence now challenged.

Segura, 468 U.S. at 813-814.

Subsequently in *Murray*, the Court again rejected a purely temporal theory of causation. Police had made a forcible, warrantless, and illegal entry into a warehouse where the defendant recently had been seen and found numerous burlapped-wrapped bales of marijuana in plain view. The police then exited the warehouse and kept it under surveillance, but did not reenter until they had secured a warrant, eight hours later. 487 U.S. at 535-536. The defendant attempted to distinguish *Segura* by arguing that unlike the evidence seized in *Segura*, the bales of marijuana had been observed during the officers' initial entry. The Court rejected the argument.

> Knowledge that the marijuana was in the warehouse was assuredly acquired at the time of the unlawful entry. But it was also acquired at the time of entry pursuant to the warrant, and if the later acquisition was not the result of the earlier entry there is no reason 'why the independent source doctrine should not apply.'
>
> The ultimate question, therefore, is whether the search pursuant to warrant was in fact a genuinely independent source of the information and tangible evidence at issue here. This would not have been the case if the agents' decision to seek the warrant was prompted by what they had seen during the initial entry, or if information obtained during that entry was presented to the Magistrate and affected his decision to issue the warrant.

Murray, 487 U.S. at 541-542 (footnote omitted).

Evidence seized under a valid warrant following an entry that does not comply with knock and announce

requirements is even more attenuated than the evidence seized in *Murray* and *Segura*. Here, not only was the information supporting the warrant "wholly unconnected with the entry and. . . known to the agents well before the initial entry," (*Segura*, 468 U.S. at 614), but the warrant itself was secured prior to the entry and completely unconnected to it.

The exclusion of evidence seized pursuant to a valid warrant solely because of a violation of knock and announce principles violates a cardinal tenet of this Court's Fourth Amendment jurisprudence: that the police not be put in a worse position than if the violation had not occurred. *Murray*, 487 U.S. at 541; *Nix v. Williams*, 467 U.S. at 443; *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 392 (1920). The mere existence of an illegality preceding the execution of a warrant should not render the evidence seized pursuant to the warrant inadmissible, unless the illegality is causally related to the seizure. *See, e.g., Waller v. Georgia*, 467 U.S. 39, 43-44, n.3 (1984); *McGuire v. United States*, 273 U.S. 95, 99 (1927). Under this Court's well established causation jurisprudence, the exclusionary rule should not be applied to suppress evidence seized pursuant to a search warrant, which is the "independent source" of the seizure of evidence, solely because officers fail to comply with knock and announce principles.

III.

THE CONSTITUTION DOES NOT COMPEL THE EXCLUSION OF EVIDENCE WHICH INEVITABLY WOULD HAVE BEEN DISCOVERED PURSUANT TO A SEARCH WARRANT OBTAINED BY OFFICERS PRIOR TO ANY KNOCK AND ANNOUNCE VIOLATION

Evidence seized pursuant to a search warrant is admissible under the "inevitable discovery" doctrine despite an earlier violation of knock and announce principles. Like the "independent source" doctrine, the inevitable discovery doctrine "ensures that the prosecution is not put in a worse portion simply because of some earlier police error or misconduct." *Nix v. Williams*, 467 U.S. at 443. When the evidence would inevitably have been discovered, exclusion puts the prosecution in a worse position, "because the police would have obtained that evidence if no misconduct had taken place." *Id.* at 443-444.

In this case, it was undisputed that officers had a valid search warrant supported by probable cause that permitted entry into the defendant's home after an announcement of their identity and purpose, and a search of the premises. Had the officers waited 10, 20 or 40 seconds more, they still would have entered the home and discovered the drugs and weapons. Thus, suppression of the evidence put the prosecution in a worse position than it would have been in absent the knock and announce violation. That the evidence would have been inevitably discovered is a matter of fact, not open to speculation. *United States v. Jones*, 149 F.2d at 716-717; *People v. Stevens*, 460 Mich. at 638-643, 597 N.W.2d at 60-63.

This Court has refused to recognize a constitutional right to destroy evidence. Occupants of a dwelling have no cognizable privacy interest in hiding or

destroying evidence of a crime (*Segura*, 468 U.S. at 815-816 & n.10), or in making an escape (*Miller v. United States*, 357 U.S. 301, 309 (1958)). If an occupant plans none of these actions, and is otherwise lawfully engaged, the most that waiting 20 to 40 seconds after police knock and announce their presence and purpose would possibly prevent is a broken door, which is precisely the type of harm that is compensable in a tort or civil rights action, or by criminal prosecution of an officer for willfully exceeding his authority or exercising it with "unnecessary severity." *See* 28 U.S.C. § 2234.

> But at this juncture, we are reminded of Justice Frankfurter's warning that '[s]ophisticated argument may prove a causal connection between information obtained through [illegal conduct] and the Government's proof,' and his admonition that the courts should consider whether '[a]s a matter of good sense . . . such connection may have become so attenuated as to dissipate the taint.' [Citation.] The essence of the dissent is that there is some 'constitutional right' to destroy evidence. This concept defies both logic and common sense.

Segura, 468 U.S. at 86.

"Nothing in this Court's prior holdings supports any such formalistic, pointless and punitive approach." *Nix*, 467 U.S. at 445. Yet, decisions from lower federal and state courts across the Nation are setting a course which does just that. Accordingly, this Court should grant certiorari to settle the question consistent with its prior holdings that exclusion of evidence which inevitably would have been discovered absent police misconduct should not be suppressed. To do otherwise would be to ignore the "enormous societal cost of excluding truth in the search for truth in the administration of justice" (*Nix*, 467 U.S. at

445), as well as serve as a counterproductive sanction where challenged police conduct is motivated not be a desire to gather evidence, but by independent concerns, most often the protection of themselves or others. *See, e.g., New York v. Quarles*, 467 U.S. 649, 655-657 (1984); *cf. Michigan v. Summers*, 452 U.S. 692, 701-702 (1981).

CONCLUSION

For all of the foregoing reasons, petitioner, the People of the State of California, respectfully requests the Court grant certiorari in this case.

Dated: March 28, 2000.

Respectfully submitted,

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APPENDIX 1

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL

FOURTH APPELLATE DISTRICT, DIVISION ONE

THE PEOPLE,	)	D030489
	)	
Plaintiff and Respondent,	)	(Super. Ct. No.
	)	SCN055787)
v.	)	
	)	
BRENT A. JOHNSON,	)	
	)	
Defendant and Appellant.	)	
	)	

APPEAL from a judgment of the Superior Court of San Diego County, Edward B. Huntington, Judge. Reversed.

As part of a plea agreement, Brent A. Johnson pled guilty to one count of possessing methamphetamine for sale (Health & Saf. Code, § 11378) and admitted he was personally armed with a firearm within the meaning of Penal Code[1] section 12022, subdivision (c). The trial court placed Johnson on formal probation for three years on certain terms and conditions, including he serve 330 days in jail, and granted bail pending appeal.

Johnson appeals, contending the court should have suppressed evidence because police violated section 1531 -- the knock and notice requirement -- in executing a search warrant.

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1. All further statutory references are to the Penal Code unless otherwise specified.

FACTUAL BACKGROUND

On January 16, 1997, at 6:10 a.m., police executed a search warrant at Johnson's apartment in Escondido. Upon arrival, Escondido Police Officer Albert Estrada announced that the police had a search warrant and were demanding entry. Officer Ted Hensen immediately started to batter the front door with a ram, beginning as soon as Estrada finished his announcement. Because the door was barricaded with a loveseat, Hensen had to batter the door an additional seven or eight times before he smashed open the door.

Estrada testified at the suppression hearing that police had received information that there was a large amount of drugs inside the apartment and Johnson was "possibly armed." Estrada also testified he had information that Johnson was known to keep a gun by his side or close to him. Based on that information, Estrada said the police treated the execution of the warrant "as a dangerous situation with a potential for violence." Both Estrada and Hensen noticed there was a sticker in the window that said "Insured by Glock," which Estrada said "indicated that the occupants of the house had some kind of weapon."

Police found 8.43 grams of methamphetamine in a gun case and a pound of marijuana underneath a pile of clothes in the close. Police also found a pager, a triple beam scale, a ledger and $290 inside the pocket of Johnson's jeans.

An unloaded 12-gauge shotgun was on Johnson's bed. Johnson gave police the combination to his safe; inside was an unloaded Glock 9mm semi-automatic handgun. Both firearms were registered to Johnson.

DISCUSSION

In reviewing a ruling on a motion to suppress evidence, we defer to the trial court's findings of fact, whether express or implied, if those findings are supported by substantial evidence. We independently determine the relevant legal principles and apply those principles in evaluating the reasonableness of the search based on the facts as found by the trial court. (*People* v. *Williams* (1988) 45 Cal.3d 1268, 1301.)

The knock and notice requirement is an element of the reasonableness inquiry under the Fourth Amendment guarantee against unreasonable searches and seizures. (*Wilson* v. *Arkansas* (1995) 514 U.S. 927, 934.)

Section 1531[2] requires that a law enforcement officer -- before entering a house to execute a search warrant -- give notice of his or her authority and purpose and be refused admittance, either actually or constructively.

The law requires police, before entering a residence by force, to (1) knock or use other means reasonably calculated to give adequate notice to the occupants of their presence, (2) to identify themselves as police officers and explain their purpose, (3) demand entry and (4) give the occupants a reasonable opportunity to permit a peaceable entry and/or be refused admittance. (*People* v. *Abdon* (1972) 30 Cal.App.3d 972, 977-978.)

Failure to comply with knock and notice requirements makes a search illegal. (*Duke* v. *Superior Court* (1969) 1 Cal.3d 314, 325.) "[A]n unexcused failure to fulfill the knock and notice requirements . . . nullifies the subsequent search and requires exclusion of the evidence obtained." (*Ibid.*)

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2. Section 1531 provides: "The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute the warrant, if, after notice of his authority and purpose, he is refused admittance."

The evidence is uncontradicted that not only was there no refusal of entry, the officers did not give the occupants any opportunity to respond. Therefore, the officers did not comply with section 1531.

Compliance with section 1531 is excused if there are "exigent circumstances" or if compliance would be a "useless gesture." (*People* v. *Gonzalez* (1989) 211 Cal.App.3d 1043,

> "If the unfolding events at the time of execution of the warrant give the officers a reasonable basis to conclude that evidence will be destroyed or lives will be endangered by delay, strict compliance with the statute is not required. [Citations.] Similarly, if events indicate that compliance with the statutory requirements would be a useless gesture (as where police have announced their purpose through a screen door and visible occupants of the residence stare blankly instead of responding to the officers), the requirement that the officers wait for a refusal of permission to enter is excused. [Citations.]" (*Ibid.*)

We agree with Johnson that there were no exigent circumstances that excused compliance with section 1531.

The officers viewed the situation "as a dangerous [one] with a potential for violence." This was based on the possibility of Johnson being armed, that he was known to have a gun by his side or close to him and the "Insured by Glock" window sticker. These factors -- which indicate only that Johnson possessed firearms -- do not constitute exigent circumstances. The possession of firearms "is insufficient by itself to excuse compliance with section 1531." (*People* v.

Dumas (1973) 9 Cal.3d 871, 878; see also *Turtle* v. *Superior Court* (1981) 120 Cal.App.3d 320, 329-330.)

In *People* v. *Dumas*, *supra*, 9 Cal.3d 871, a case relied upon by both parties, the Supreme Court cautioned that in situations where police have information that a defendant possesses weapons it is particularly important that they gave notice.

> "We have recognized that one of the primary purposes of section 1531, in addition to the protection of individual privacy, is to prevent possible violent responses that might be aroused in a startled and fearful householder suddenly confronted with unknown persons breaking into his home for unannounced reasons. [Citation.] The danger that such a confrontation will result in serious injury or death to the occupant, police officers, or innocent bystanders is obviously intensified when the householder is in possession of a firearm. Thus, where the police are aware of such a weapon, the case for requiring them to give notice of their authority and purpose becomes more rather than less compelling." (*Id.* at p. 878.)

Our Supreme Court went on to say that police knowledge that the defendant possesses a firearm will excuse compliance "with announcement requirements only where the officers reasonably believe the weapon will be used against them if they proceed with the ordinary announcements. [Citations.] This belief must be based on specific facts and not on broad, unsupported presumptions." (*People* v. *Dumas*, *supra*, 9 Cal.3d at pp. 878-879, italics added; see

also *People* v. *Gastelo* (1967) 67 Cal.2d 586.)[3/]

Neither Estrada nor Hensen testified they believed a weapon would be used against them; they merely said there was a potential for violence. Indeed, the prosecution adduced no facts from which a police officer could have formed a reasonable or good faith belief that a weapon would be used against them if they complied with section 1531. All the police had was speculation, and that is not enough.

As the Supreme Court observed in *People* v. *Dumas*, *supra*, 9 Cal.3d at page 879: "[M]any suspects with no intention whatever of attacking a police officer might have understandable reasons and legal grounds for possessing firearms." We note that many gun owners display signs, bumper stickers and window stickers that announce the fact they possess guns or are members of organizations that promote gun ownership; there is nothing inherently evil in such public displays. Nor does the presence of these signs or stickers reasonably suggest that police officers are facing increased peril at the hands of the individuals who display them.

Finally, we note the doctrine of inevitable discovery does not prevent application of the exclusionary rule here. The Attorney General's reliance on *People* v. *Lamas* (1991) 229 Cal.App.3d 560, 570, is misplaced. The case holds the inevitable discovery doctrine applies to situations where police violate a knock and notice statute and then obtain a valid search warrant using information from a source independent of the illegal entry. (See *People* v. *Lamas*, *supra*, 229 Cal.App.3d at pp. 564-565 & 571.) The Court of Appeal explicitly noted it was not addressing whether the inevitable discovery doctrine could save a knock-and-notice

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3. In *Dumas*, the Supreme Court found the failure to comply with section 1531 was excused where police had information that defendant not only possessed weapons but habitually answered the door armed with a firearm. (*People* v. *Dumas*, *supra*, 9 Cal.3d at pp. 877, 879.)

violation occurring in the execution of a valid search warrant. (*Id.* at p. 570, fn. 1.)

We conclude the noncompliance with section 1531 and the forced entry were unreasonable under the Fourth Amendment. The seized drugs should have been suppressed.

DISPOSITION

Reversed.

HALLER, J.

WE CONCUR:

BENKE, Acting P.J.

NARES, J.

APPENDIX 2

FOURTH APPELLATE DISTRICT, DIVISION ONE,
NO. D030489
S084697

IN THE SUPREME COURT OF CALIFORNIA
EN BANC

THE PEOPLE, Respondent

v.

BRENT A. JOHNSON, Appellant

Respondent's petition for review DENIED.

Mosk, J., and Brown, J., are of the opinion the petition should be granted.

Chin

Acting Chief Justice

Opposition Brief Unavailable for Filming